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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 734

THE GAS SERVICE COMPANY, SHEFFIELD STEEL, DIVISION, ARMCO STEEL CORPORATION, MIDWEST INDUSTRIAL & COMMERCIAL GAS USERS ASSOCIATION, and KANSAS CITY POWER & LIGHT COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioners,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Gas Service Company ("Gas Service"), *Sheffield Steel, Division, Armco Steel Corporation* ("Sheffield"), *Midwest Industrial & Commercial Gas Users Association* ("Midwest"), and *Kansas City Power & Light Company* ("KCP & L"), jointly referred to as "Petitioners", pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above cause on July 21, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-9a) affirming (one judge dissenting) an order of the Federal Power Commission is reported at 282 F.2d 496. The Order of the Federal Power Commission entered on June 19, 1959, (R. 30-32) is not reported. The Order denying rehearing (R. 67-68) is reported at 22 F.P.C. 456.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1960 (App. A, *infra*, p. 9a). A timely petition for rehearing was denied on September 19, 1960 (App. A, *infra*, p. 9a). The Chief Justice, by order dated December 1, 1960, extended time for filing petition for writ of certiorari to and including February 16, 1961. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b), and 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Section 4 of the Natural Gas Act (App. B, *infra*, p. 11a) empowers the Federal Power Commission to pass upon the lawfulness of any change in rates filed by natural gas companies, and pending investigation to suspend the changed rates for a five-month period, except it may not suspend rates governing "sale of natural gas for resale for industrial use only" ("I" rates). The Act also provides that the Commission may require natural gas companies to furnish a bond securing refunds of increased charges found unlawful and not justified, and that it may order any unlawful amounts so collected by natural gas companies to be refunded at the conclusion of its investigation.

The following questions are presented:

1. Whether, such an investigation having been ordered, Section 4 of the Natural Gas Act empowers the Commission to require a bond and order refunds of amounts collected under "I" rates found by the Commission to be unlawful.

2. Whether the court below in passing upon the Commission's power to require bond and refunds on increased "I" rates could rely exclusively on two "unambiguous" sentences in Section 4(e), taken from their context in the Act; or alternatively whether it should have been guided by the purpose and legislative history of the whole Act, since the conclusion reached by the court clashed both with the Act's history and purpose, and in particular with the mandate of Section 4(a) and 4(b) providing that all rates and charges "shall be just and reasonable" and nondiscriminatory "between classes of service."

3. Whether Section 4(e) of the Act, as interpreted by the Commission to deny it power to require bond and make refunds on changed "I" rates, would violate the due process clause of the Fifth Amendment to the Constitution of the United States by denying petitioners a hearing as to the lawfulness of the rates, resulting in an illegal taking of their property, as well as by making an unconstitutional delegation of legislative power contrary to Sections 1 and 8 of Article I of the Constitution.[1]

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[1] Petitioners reserve the right to argue, should it become material to the issues, that there was no exercise of discretion by the Commission, but that if its action was in the exercise of discretion, the Commission abused its discretion in the circumstances disclosed in the record.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717 *et seq.*, are set out in Appendix B, *infra*, pp. 10a-13a. Also set forth in App. B (*infra*, p. 10a) are the Constitutional provisions relied upon by Petitioners.

STATEMENT

Cities Service Gas Company (Cities Service) is a major interstate natural gas pipeline company which is a natural gas company within the meaning of the Natural Gas Act. It transports and sells large volumes of natural gas to distributors within the states of Kansas, Missouri, Oklahoma and Nebraska. Such distributors (including petitioner, Gas Service) in turn supply natural gas to all types of ultimate consumers, including industrial users.

In May, 1959, Cities Service filed under Section 4 of the Natural Gas Act (App. B, *infra*, pp. 11a-12a) a general increase in all of its filed rate schedules (including its industrial resale rates, hereinafter termed "I" rates.)[2] The increased charges amounted to approximately $10.5 million annually, of which approximately $2.6 million (R. 29) represented increases of 29 per cent in Cities Service's "I" Schedules.

The Commission, by order entered on June 19, 1959, (R. 30), docketed Cities Service's revised rate schedules, and finding that *none* had been shown to be justified and hence that *all* might be unjust, unreasonable,

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[2] Cities Service's Revised Rate Schedules I-1 and I-2 (R. 11-15). These schedules permit resale only for industrial use, defined in Cities Service's tariff (R. 20) as use of gas "in a process which creates or changes raw or unfinished material into another form or product", including the generation of electricity.

or otherwise unlawful, ordered a hearing and investigation into the lawfulness of *all* the increased rates (including the "I" rates). The Order suspended all the increased rates for the full five-month statutory period except the "I" rates which were non-suspendible under a *proviso* to Section 4(e) of the Natural Gas Act (App. B, *infra*, p. 12a). Despite its finding and order subjecting the increased "I" rates to hearing and investigation, the Commission's June 19, 1959 order[3] permitted them to become effective on June 23, 1959, without bond or other provision for refund of any amount which might be unlawfully collected by Cities Service. (Subsequently the Commission permitted the suspended rates to become effective November 23, 1959 on undertaking securing refund of any excess charges collected thereunder.)[4]

Petitioners, which include Gas Service, two of its largest "I" gas customers, and an association representing purchasers of about 60 per cent of Gas Service's "I" gas,[5] timely sought rehearing of that portion of the Commission's order of June 19, 1959, which allowed the increased "I" rates to go into effect without provision for bond or refund. Petitioners' contended that the Commission was given the authority

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[3] The order here under review.

[4] FPC Order issued December 16, 1959.

[5] Gas Service, a distributor in Kansas, Missouri, Oklahoma and Nebraska, is the largest distributor supplied by Cities Service and is the sole distributor in the Kansas City area; it purchases approximately 95 per cent of its gas supply from Cities Service, including 90 per cent of Cities Service's "I" gas (R. 33-34, 41). The other petitioners, Sheffield, KCP&L, and Midwest are, or represent, the ultimate consumers of about 70 per cent of Cities Service's "I" rate gas (R. 41).

by Section 4(e) of the Act to require bonds or undertakings ensuring refunds of increased "I" rates. They contended that the Commission, having found that the increased "I" rates were not supported and might be unlawful, should have subjected them to a refund obligation; otherwise, petitioners (including KCP&L, a large electric utility serving domestic and commercial customers, as well as many small businesses represented by Midwest[6]) might be saddled with unlawful rates for an indefinite period, with no possibility of reparation (R. 38-48).[7] (See *infra*, pp. 8-9.)

Petitioners also argued that since approximately 40 per cent of pipeline rate increases on an average have proved unlawful (see *infra*, p. 9), the "I" gas users would be required, conservatively, to pay $2,600,000 in unlawful charges over a three-year period, raising serious doubts as to the constitutionality of Section 4(e) of the Act, as interpreted by the Commission (R. 44-46).

The Commission denied rehearing, on August 27, 1959, on the ground that since the Commission could not suspend the "I" schedules, it had no power to order bond or other provisions for refund (R. 67-68).

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[6] KCP&L serves over 220,000 residential customers and 36,000 commercial and industrial customers with electric power (R. 35). Since its fuel requirements in large part are supplied by Gas Service, Cities Service's "I" rates paid by Gas Service have a direct effect on the electric bills paid by KCP&L's customers. Midwest represents 99 industrial and commercial gas users.

[7] Gas Service has been permitted by the Kansas and Missouri regulatory commissions to increase its own rates to industrial users to reflect the Cities Service increase, subject to an obligation to refund to its customers any amounts which might be refunded to Gas Service by Cities Service (R. 42, 45, 51-53, 57-65).

The Court of Appeals, Judge Bastain dissenting, affirmed the Commission order, holding that under Section 4(e) of the Natural Gas Act the Commission had no power to require a bond or make provision for refund of amounts unlawfully collected under an increased "I" schedule.[8] In so holding, the majority expressly declined to scrutinize the history and the purpose of the Natural Gas Act as a whole, and failed to consider the provisions of Sections 4(a) and 4(b) of the Act, stating (App. A, *infra*, p. 4a):

> "We regard Section 4(e) as unambiguous, so we do not need to consider the legislative history which both parties urge upon us as supporting their opposing contentions. We think 'this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute'."[9]

Judge Bastian, dissenting, concluded that both the language of Section 4 and its legislative history demonstrates that the Commission has the power to require bonds covering amounts collected under increased "I" rates (App. A, *infra*, p. 9a). The court denied rehearing *en banc* (*ibid*), and this petition followed.

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[8] By implication, the Court also appears to hold that the Commission has no refund power over these rates.

[9] The opinion does refer to a perfunctory discussion of the legislative history in another court of appeals decision (discussed, *infra*, pp. 24-27), but does not consider or comment on the evidence of congressional intent presented and analyzed exhaustively by all parties herein.

REASONS FOR GRANTING THE WRIT

The majority below, relying solely on what it calls the "plain language" of Section 4(e) of the Natural Gas Act, but ignoring the Act's general policy of consumer protection, and refusing itself to scrutinize the Act's legislative history,[10] has decided that natural gas distributors are not entitled to refunds of unlawful amounts paid under "industrial resale" rates exacted unilaterally by pipelines, and subsequently found unjust and unreasonable by the Federal Power Commission. The decision thus deprives one class of consumers of the refund protection against unlawful rates provided all other consumers by the Natural Gas Act.

1. This issue is one of major and recurring importance in the administration of the Natural Gas Act, and until decided by this Court will continue to impede the administration of the Act, with resulting injury to consumers.

Six major natural gas pipeline companies[11] sell large volumes of natural gas to distributing companies under so-called "I" schedules permitting resale only to industrial users. These pipelines in recent years have filed repeated increases in their "I" schedules which, as in the present case, the Commission has ordered investigated, but has not (unlike all other types of schedules) subjected to a bond or other undertaking for refund.[12] Under the decision below, no amount

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[10] See fn. 9, *supra*, p. 7.

[11] The five companies, in addition to Cities Service, are listed in fn. 12 ff.

[12] United Gas Pipe Line Company has seven rate increase cases pending (G-9547, G-10,592, G-12,801, G-15,360, G-18,406, RP60-2 and RP61-18), filed from 1956 to 1961; Alabama Tennessee Nat-

collected under increased "I" rates ultimately found unlawful by the Commission will be refunded, although approximately 40 per cent of all pipeline rate increases (including "I" rates) passed upon by the Commission have been found unlawful.[13]

This unfortunate situation is succinctly documented in the recent report of the Subcommittee on Legislative Oversight of the House Interstate and Foreign

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ural Gas Company has four pending (G-5471, G-11,982, G-17,218, G-19,984), filed from 1955 to 1959; El Paso Natural Gas Company has three pending (G-42,948, G-17,929, and RP60-3); and Pacific Northwest Pipe Line Company (G-13,202) has one pending. Colorado-Wyoming Gas Company's rate proceeding (G-13,577) was settled in 1960.

[13] Almost invariably, rate increases proposed by natural gas companies under the Natural Gas Act have proved to be excessive by substantial amounts. In 1952, the Commission observed: "In most cases it has been found after investigation and hearing that the requested increases were justified only in part and in some few instances not at all." (Thirty-second Annual Report of the Federal Power Commission [1952], at page 95). In that year reported figures showed that of the natural gas rate increase applications disposed of, about 50% of the proposed increases or over $30,000,000 was disallowed as not justified (*Id.*, at page 97). In 1953 the disallowed amounts in concluded cases represented 16% or over $11,000,000 (Thirty-third Annual Report of the Federal Power Commission [1953], at page 101). In 1956 the disallowances represented 40% or almost $10,000,000 and in 1957, 17% or about $9,000,000 (Thirty-seventh Annual Report of the Federal Power Commission [1957], at page 82). In 1959 the disallowances in cases disposed of represented 40% or $15,600,000 (Thirty-ninth Annual Report of the Federal Power Commission [1959], at page 78).

Rate increases filed by pipeline companies, the Commission complained to Congress (Thirty-third Annual Report of the FPC [1953], p. 102), more often than not are based on "speculative estimates of future costs" and attempted "changes in regulatory principles and methods which have long been established".

Commerce Committee (H. Rep. No. 2238, 86th Cong. 2d Sess., January, 1961, p. 26):

> "At the request of the subcommittee, the FPC prepared a tabulation of gas rate increases to gas pipeline companies as of March 1, 1960. This shows that as of that date there were 113 rate suspensions in effect in a cumulative amount of $506,420,052, of *which probably 40 percent must eventually be refunded to a company's customers.*
>
> * * * * *
>
> "The tabulation prepared by FPC shows that the percentage of proposed rate increases allowed has been 59.5. *This is conclusive evidence that the rate increases proposed by the pipeline companies have been unjust and unreasonable. There is no reason to suppose that they will not continue to be.* This situation imposes a tremendous burden on the Commission and possibly works an injustice on the consumers of the Nation. Unreasonable rates collected subject to refund result in the collection of large sums of money by the pipeline companies over a period of several years before the refund is ordered." [Emphasis added]

The decision below compounds the "normal" excessiveness of rate increases by permitting *no refunds* on that portion collected under unjustified "I" rates. Thus, the majority below has opened a large and highly "attractive gap" in the scheme of regulation of gas pipelines adopted by Congress in 1938 (*Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 524). Pipelines have been quick to use such "I" schedules to obtain repeated unilateral rate increases (fn. 12, *supra*, p. 8) which (under the Commission's view) are substantially unregulated, since the "nigh interminable" delay in Commission rate proceedings noted in *Atlantic*

Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378, 389, has made it impossible for the Commission to pass upon the lawfulness of such rates until years after the filing, if ever.[14]

The Oversight Subcommittee Report leaves little doubt that consumers have and will suffer substantial injury by the Commission's view that increased "I" schedules are non-refundable. Pipelines have frequently utilized refundable rate increases as a means of obtaining capital. *A fortiori*, they have and will file for excessive "I" rate increases since, if the opinion below stands, these increases are non-refundable. As the Report states (*Ibid.*, p. 26):

> "*Financing by rate increases.*
>
> With this policy of the Commission permitting plural suspended rate increases in effect the pipeline companies are encouraged to file numerous progressive rate increases. The practical aspect is that pipeline companies thus are furnished an expeditious and cheap method of financing expansion. A typical rate filing will permit a company to accumulate tens of millions of dollars without pledging assets or selling stock. * * * * It is also interesting to note that although hundreds of millions of dollars are ordered refunded to the

[14] In the absence of refund power, the Commission may never be able to set just and reasonable "I" rates since the pipelines are able to file periodic increases (fn. 12, *supra*) negating the prospective effect of Commission rate orders. A pipeline general rate increase proceeding takes a minimum of two to five years to complete; the cost data on which the Commission would base its rate determination would be out of date by the time of issuance of its final rate order, and hence could not, following that rate order, lawfully prevent the pipeline from filing new increased industrial schedules which in turn would take a minimum of two to five years to review. And so forth.

Nation's consumers, FPC has never made a study to determine if the money actually reaches them. Once the pipeline company reports that it has refunded to its handful of distributors, the case is closed as far as the FPC is concerned."

Industrial gas users and their customers are required to bear the burden of these repeated unlawful increases without hope of reparation. Since electric generating companies (such as petitioner KCP&L) are major "I" gas users, unlawful "I" rates must frequently be passed on to residential consumers in the form of increased electric bills. The public also pays for such unlawful fuel costs in the increased costs of commodities manufactured or processed by "I" gas users.

These wholly unregulated and unlawful "I" rates have also injured both domestic and industrial consumers by causing utilities, such as Gas Service, to lose "load-balancing" industrial sales to other fuels, or even to their pipeline suppliers. When this occurs, domestic as well as other consumers are required to bear a higher percentage of the costs of utility or pipeline distribution, resulting in increased rates.[16] Such unlawful rates also penalize industrial customers who are tied to their only available pipeline suppliers by economic or technical requirements for natural gas. (See *infra*, pp. 22-24).

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[16] This general industrial problem is described at length in the Brief for the Federal Power Commission (pp. 55-73), as well as in the brief *amicus curiae* for the Southern California Gas Company and Southern Counties Gas Company of California (pp. 15-17), in *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, Nos. 45 & 46, this term.

It must be evident from the foregoing that there has been a breakdown of Federal regulation of pipeline wholesales in interstate commerce, including industrial wholesales. It follows that absent a Federal power to order refunds, there is *no* regulatory protection against excessive "1" rates, since no state, under existing constitutional doctrines, can regulate a pipeline selling at wholesale in interstate commerce.[16] It follows that industrial consumers, which can look only to the Federal Government for protection against these excessive rates, are denied that protection under the Commission's construction of the Act. This denial of protection to domestic and industrial consumers against excessive pipeline wholesale rates contradicts the expressed intent of the Natural Gas Act. (As we shall show, *infra*, it also raises substantial doubts as to the constitutionality of Section 4 of the Act as here applied.)

This Court in its recent opinion in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.* (Nos. 45 and 46, this Term, Slip Op. 17-18) held that:

> "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies.' *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U.S. 137, 147. To that end, Congress 'meant to enact a comprehensive and effective regulatory scheme.' *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 332 U.S. 507, 520. See *Public Utilities Comm'n* v. *United*

[16] *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83; *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298. See also *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana*, 332 U.S. 507, 514.

Fuel Gas Co., 317 U.S. 456, 467. It is true, of course, that Congress did not desire comprehensive *federal* regulation; much authority was reserved for the States. But, it is equally clear that Congress did not desire that an important aspect of this field be left unregulated. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, *supra*. Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare *Guss* v. *Utah Labor Board*, 353 U.S. 1. *That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate in given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.*" (Emphasis added.)

It follows that if the Natural Gas Act can be *rationally* interpreted as giving the Commission *effective* regulatory control over pipeline "I" rates—and we show *infra* that it can—this Court has held that the Commission must exercise that control, in view of the fact that no State Commission can do so. For, as the Court has said (*Ibid.*, Slip Op., pp. 26-27):

> "The point is, as we have stated, that *Congress did not desire an 'attractive gap' in its regulatory scheme*; rather, *Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource*. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, *the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation*. See *Panhandle East-*

ern Pipe Line Co. v. *Federal Power Comm'n*, 232 F.2d 567." (Emphasis supplied.)

It is not surprising that the Commission's self-crippling view of its refund powers under the Act has led to continual controversy and litigation, since it is so basically at odds with the Act's fundamental purpose of filling the "gap" in regulation resulting from the primary responsibilities of the Federal Government under the Commerce Clause. The present issue was first presented to this Court but not reached in the *Mobile* case.[17] It was mooted in the *Memphis* case, but again was not reached or decided.[18] Now the issue is once again posed, not only by the decision below but also in a parallel case, *Mississippi Valley*, awaiting argument in the Fifth Circuit.[19]

The major and long continued importance of the "I" rate refund issue fully warrant consideration and final disposition by this Court.

[17] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332. The issue was raised by petitioner but not reached by this Court because it held that United could not increase its "I" rates in view of the United-Mobile fixed price contract.

[18] *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103. The issue was not reached because respondent in that case did not challenge the Commission's self-limiting interpretation of Section 4 but rather argued that United under *Mobile* could not unilaterally increase its rates to Memphis. However, the issue was frequently adverted to: see Brief for Respondent Memphis Light, Gas & Water Division, Nos. 23, 25 & 26, 1958 Term, pp. 63-72, 91, and 358 U.S. at 115-116, 119-120.

[19] *Mississippi Valley Gas Co.* v. *FPC*, CA5, No. 18,501, involving a petition to review an FPC order denying a motion by a gas distributor requesting the Commission to provide for bond ensuring refund on increases in "I" rates filed by United Gas Pipe Line Company in its seven pending rate cases. See, *supra*, fn. 12, pp. 8-9.

2. The majority below has also departed sharply from controlling decisions of this Court by basing its decision on a purely grammatical construction of two sentences pulled out of the context of Section 4 of the Natural Gas Act, and by failing to scrutinize the legislative history and consider the purpose of the Act.

The majority, concluding that two sentences contained in Section 4(e) (App. A, *infra*, p. 4a) read in isolation are "unambiguous," held that it need not go further to consider the history and purpose of the Natural Gas Act as a whole, as these might bear on the extent of the refund power. Had the majority been willing to look at the whole act's purpose and legislative history, it might well have concluded, as did the dissenting judge, that both condemn the Commission's construction.

Since the primary purpose of the Act is consumer protection against unjust rates (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610), any limitations on the Commission's critically important refund powers over pipeline rates should be carefully scrutinized, and given only the effect necessarily intended by Congress. Hence, the assertion that Congress, in restricting the Commission's far less important suspension powers also intended, incidentally and by inference only, to limit its vital refund powers over pipeline rates, *must* be tested both by history and the impact on the Commission's administration of the Act. As the Court held in *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 543-544:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are suf-

> ficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.* Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. *When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'.*" (Footnote citations omitted, emphasis added.)

We have seen, *supra*, that the Commission's self-imposed limitation on this most important regulatory power is "plainly at variance with the policy of the legislation as a whole." As the *Transcontinental* decision, *supra*, held (Slip Op. 17):

> "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies.' *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U.S. 137, 147. To that end, Congress 'meant to enact a comprehensive and effective regulatory scheme.' *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 332 U.S. 507, 520. See *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 467."[20]

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[20] With this objective before it, Congress framed the Natural Gas Act so "as to afford consumers a *complete*, permanent and effective bond of protection from excessive rates and charges". *Atlantic Refining Company* v. *Public Service Comm'n of New York*, 360 U.S. 378, 388. Congress "created an articulate legislative program based on a clear recognition of the respective re-

The complete protection against excessive rates provided in the Natural Gas Act extends to industrial users of natural gas as well as to domestic and commercial users. *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 595-596; and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332. It was "'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, *industrial*, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.'" *Atlantic Refining, supra*, 360 U.S. at 388. (Emphasis added.) Thus, Congress provided in Section 1(b) of the Act, which determines the Act's coverage, that its provisions:

> "shall apply to . . . the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. . . ."

It follows that the majority below have limited one of the Commission's most basic regulatory powers without considering either the purpose or history of the whole Gas Act, contrary to the decisions of this Court. Since the results of this unnecessary judicial abnegation is *ineffective* pipeline rate regulation not contemplated by Congress, review by this Court is fully warranted.

3. We have shown that the Act's manifest purpose of consumer protection is undermined by the Commission's interpretation of its refund powers. We also

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sponsibilities of the federal and state regulatory agencies" which "*does not contemplate ineffective regulation at either level*". *Panhandle Eastern Pipe Line Co., supra*, 332 U.S. at 520. (Emphasis added.)

show briefly that the language of Section 4 of the Act when read in context, as well as its history, squarely refute the interpretation of the Commission that it lacks refund power upon industrial rates.

a. It is of the highest significance that the one judge (Judge Bastian) who was willing to consider both the purpose of the Act and the history of Section 4 concluded that the Commission had the power to bond and order refunds on "I" schedules. The majority below relies solely upon the juxtaposition of the phrase in Section 4(e) of the Natural Gas Act (App. B, *infra*, p. 12a): "If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect," and the phrase "Where increased rates or charges are *thus* made effective, the Commission may . . ." require a bond. The court states (App. A, *infra*, p. 4a) that "The word 'thus' is the key that locks the Commission's bonding privilege to the preceding sentence and confines its exercise to the situations there described."

The word "thus", however, can also grammatically and logically refer to any rate made effective pursuant to an investigation ordered under Section 4(e),[21]

[21] While, as the court below concluded, the antecedent of "thus" could be the preceding clause involving the suspension power, the more appropriate reference—in view of the language of Section 4 as a whole as well as the policy of the Act—is to the provisions of Section 4(e) which (in contra-distinction to Section 4(d)) permit a rate to be made effective, pending investigation, *with or without* suspension. It should be noted that the Commission has never contended that its investigative and rate setting power is dependent upon its suspension power.

whether or not suspended, and this interpretation is far more consistent with the Act's structure and purpose than that of the court below.

Section 4(d) of the Act requires all changes in schedules governing rates in force to be filed with the Commission 30 days prior to their effective date. *United Gas Pipe Line Co., supra,* 350 U.S. at 342.

Section 4(e) of the Act empowers the Commission, when any change in rate is thus filed, to enter upon a hearing concerning its lawfulness and, pending such hearing, to *suspend* for a five-month period the operation of the new rate, except it cannot suspend a new "industrial" rate. If the proceeding has not been concluded at the end of the suspension period, the suspended rates go into effect on motion of the seller. Upon determining the reasonable rates, the Commission is clearly empowered by the Act to order the seller to refund, with interest, any amounts paid under the increased rates found not justified. Nothing in the Act's language suggests, let alone compels, exclusion of industrial rates from the right to refunds.

The Commission views its power to require bonds or refunds as dependent on its power to suspend. This position misconceives the intent of Congress by confusing these two powers. They are completely unrelated—different in purpose and result.

The Section 4(d) provision for 30-days' advance notice of changes is merely to afford the Commission a reasonable period within which to determine whether to do nothing and permit the new rates to go into effect, or whether to investigate the new rates under Section 4(e) of the Act. *United Gas Pipe Line Co., supra,* 350 U.S. at 342-343. It is obvious from Section 4(e)

that if the Commission decides to investigate any new rate, it may do so with or without suspension (except, of course, in the case of a new "1" rate which can be investigated but is not subject to suspension). In other words, as the Commission has frequently recognized, its investigative and rate fixing power is not dependent on exercise of its suspension power.

If the power of suspension is exercised, the new rate may not be collected at all during the suspension period and the previous rate remains in effect. Even if the Commission ultimately determines that the new rate is reasonable, the seller may not collect it through the suspension period. *Hope Natural Gas Co.* v. *FPC*, 196 F.2d 803, 805-806 (CA4). The purpose of the suspension power is, therefore, to enable the Commission to preserve the *status quo* while it subjects the rate change to additional scrutiny which the thirty-day notice does not permit.

On the other hand, the refund power of the Commission covers the entire period of investigation during which the newly filed rate has been paid by the purchaser (as noted, *supra*, pp. 8, 11, fns. 12, 14, normally a two to five year interval), whether or not suspended, and permits the restoration to the purchaser of only that part of the increase found not to be justified. The purpose of the refund power, therefore, differs from the power of suspension. The suspension power nullifies new rates for a limited period, while the refund power prevents retention of unreasonable rates collected during the full period of effectiveness until completion of investigation. The latter power alone affords the *complete protection* against excessive charges that Congress intended to provide, and implements the com-

mand of Section 4 that all rates shall be just and reasonable and non-discriminatory or preferential.

Our position in sum is that the plain language of Section 4 makes the Commission's refund power apply to any rate investigated by the Commission—not merely those rates which have been suspended. We have seen that the Act's history and purpose also support this interpretation. Furthermore, since industrial users are tied to pipeline suppliers,[22] and pipelines have virtually unrestricted power under Section 4 to increase rates by unilateral filings (*United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, *supra*, 358 U.S. 103), the Commission's interpretation of that Section must be avoided if at all possible, since it provides pipelines with a foolproof mechanism for extracting unlawful charges.

b. The Commission's interpretation raises grave doubts as to the constitutionality of Section 4 as applied to Petitioners, since their property literally is being taken without procedural due process of law by exaction of unreasonable rates not subjected to refund.[23]

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[22] It is true that a number of Gas Service's industrial customers have dual fuel facilities permitting use of other fuels for relatively short periods. However, these customers, as well as many other of its customers which cannot use other fuels, are bound technologically and economically to natural gas and must continue to use the Cities Service supply or suffer severe penalties. There is no record support for the majority's contrary inference (App. A, *infra*, p. 7a).

[23] The fact that this results in part from the current delay in completing rate investigation does not make the deprivation any more palatable from a constitutional standpoint. *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587. The majority dismissed Petitioners' claim that their property is taken without due process observing that the Commission has the discretion to bond or not

Cities Service's customers are not purchasing gas in a free market offering other available suppliers, but in a market which Congress thought would be regulated effectively. Since the Commission construes the National Gas Act so as to make it impossible to give utilities and businesses purchasing "I" gas a hearing on the lawfulness of the "I" rates, such gas users have their effective rates established *by a statutory procedure* which denies them a hearing as to whether the rates meet statutory standards; hence it denies them procedural due process. *Morgan* v. *United States*, 304 U.S. 1, 15; *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. R.*, 227 U.S. 88.

c. It is impossible to review here the legislative history of the Natural Gas Act and its predecessor bills which the majority chose to ignore—but which the dissenting judge viewed as refuting the Commission's position. This history, which is presented fully in petitioner's briefs below (Main Br., pp. 24-31; Reply Br., pp. 2-9) shows that Congress intended to provide industrial customers the protection of the Commission's refund powers, although not of the suspension powers which was regarded as unnecessary. See *infra*, pp. 25-27. In particular, it shows that Chairman Lea of the

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to bond any increased rate so that Petitioners have no "right to the protection of a bond". (App. A, *infra*, p. 8a). The majority, however, overlooked the fact that the Commission here found that *none* of Cities Service's increased rate schedules had been shown to be justified and *all* such schedule might be unreasonable and unlawful (R. 30-32). Having so found the Commission would have abused its discretion in not bonding the industrial rates, had it the power to do so. *United States* v. *Louisiana & P. Ry.*, 234 U.S. 1.

House Interstate and Foreign Commerce Committee[24] in offering (during House debate on the Natural-Gas Act) a last minute amendment inserting into Section 4(e) the *proviso* which limits the Commission's *suspension* powers over "I" rates, intended *only* to limit these suspension powers, not the Commission's refund and bonding powers. This conclusion is directly supported by the hearings, reports and debates on the Act in both Houses of Congress[25] as well as by the opinion of Judge Bastian who examined this history.

The sole reference to the Act's legislative history in the opinion below is indirectly to *dicta* in an opinion of the Ninth Circuit (*Pacific Natural Gas Co.* v. *FPC*, 276 F.2d 350, 354) involving a so-called *Memphis* question; *i.e.*, whether Section 4 or a pipeline's sale contract with one of its distributor customers authorized that pipeline to file unilateral rate increases. Since the case was decided post-*Memphis*, the issues were limited merely to an interpretation of the particular pipeline's contract language, which was even more explicit in permitting the pipeline the unilateral right to file for rate increases than the *Memphis* contract language. The distributor, incidental to its main argument on the contract, merely suggested that Section 4(e) of the Act was unconstitutional as applied to the "I" rates because it denied the Commission the power to *suspend* those rates. The distributor did not argue

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[24] Chairman Lea was the sponsor of and floor leader of the bill (H.R. 6586) which became the Natural Gas Act. (H. Rep. 709, 75th Cong., First Sess.).

[25] The House Committee Report in particular (H. Rep. 709, 75th Cong., First Sess.) shows that Congress, prior to the insertion of *proviso*, intended to subject to bonds and refunds any rate subjected to investigation, whether or not suspended.

that Section 4(e) permitted the bonding of non-suspendible increased rates for industrial resale or that refund could be required on "I" schedules, nor did it refer to the supporting language or legislative history of the Act on existence of bonding and refund power.[26]

The Ninth Circuit thus had no occasion to construe the Section 4(e) power to require bond or other undertaking for refund under "I" schedules or consider the constitutional effect since no such issue was raised. In passing on the distributor's argument relating to the *suspension* power, the Ninth Circuit commented that Congress had reasonable grounds for deciding that "I" rates, unlike other rates, need not be subject to *suspension*, because they were usually of short duration. It *assumed* without discussion in reaching this conclusion that the non-suspension *proviso* also limited the Commission's bonding power. Since this issue had not been raised or briefed to that court, its statement regarding limitation of the bonding and refund power must be regarded as *dicta*.

There can be no doubt that Congress *did* intend to withhold suspension power over rates for industrial resale, presumably because the then short-term nature of such contract rates made a five-month suspension period inappropriate and unworkable. While sus-

[26] The distributor's constitutional argument was perfunctory, the substance of it consuming only a little over two pages (pp. 16-17) in its twenty-page main brief, and was solely directed to lack of suspension of "I" rates. The Commission, in responding to this argument, relied primarily on the assertion that the distributor would not be hurt by the pipeline's increased rates, and made no reference to the legislative history of Section 4(e). Nor did the pipeline intervenor, with the exception of a passing reference in a footnote to its brief, deal with legislative history.

pension power over short term industrial contracts may have been unnecessary, this is definitely not true of bond and refund power, because, as we have seen, such a result would conflict with the Act's fundamental purpose of just, reasonable and non-discriminatory rates for protection of all classes of users. That such short term industrial contracts could not be suspended made bonding and refund power the more necessary for *any effective rate regulation.* Were the Commission limited to prospective rate review in passing on increases under say, three to five year industrial sales contracts, such short contracts might terminate prior to any Commission rate action, completely frustrating application of the "just and reasonable" standard.

It follows that Chairman Lea is offering the "suspension" proviso, (App. B, *infra*, p. 12a) could hardly have intended to deny bonding and refund powers merely because of the short-term nature of industrial resale contracts.[27]

It would seem clear, therefore, that the Court of Appeals' reference to an inadvertent comment in *Pacific*

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[27] Nor can it be argued that the short term of such contracts made effective rate increase regulation under Section 4 unnecessary because of the availability of the Commission power to control such prices in granting certificate authorization under Section 7 of the Act. In the first place, Section 7 of the original Act gave the Commission only very limited certification powers (52 Stat. 825). Also the Commission has no power to control the "justness and reasonableness" of proposed rates under Section 7, even in its present form, *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U.S. 378, and there is nothing in the language or history of the Act to suggest that consumers purchasing under short-term contracts are less entitled to protection against unlawful rate levels, than other consumers.

Natural, an opinion devoted to another issue, is no substitute for the careful scrutiny of the purpose and history of the whole Natural Gas Act required by this Court's decisions as well as the significance of this issue to natural gas regulation.

CONCLUSION

For these reasons, it is respectfully requested that the petition for a writ of certiorari be granted, and the judgment of the Court of Appeals reversed.

Respectfully submitted,

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February 16, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,401

THE GAS SERVICE COMPANY, ET AL., PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
CITIES SERVICE GAS COMPANY, INTERVENOR.

Petition for Review of Order of the Federal Power Commission

Opinion

Decided July 21, 1960

Before WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges.*

WILBUR K. MILLER, Circuit Judge: Cities Service Gas Company, which transports and sells natural gas in interstate commerce for resale, is a "natural-gas company" within the meaning of the Natural Gas Act.[1] Schedules showing its rates and charges for any transportation or sale subject to the jurisdiction of the Federal Power Commission are on file with the Commission and are incorporated into the service agreements with distributors. Cities Service, like any other wholesaler, is authorized by Section 4(d) of the Act to change its rates and charges by filing new schedules, which are subject, however, to in-

[1] 15 U.S.C. § 717 *et seq.*

vestigation and regulation by the Commission as provided in Section 4(e).[2]

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[2] The pertinent portion of Section 4(e) is as follows:

"Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. . . ."

On May 21, 1959, Cities Service tendered to the Commission for filing, revised rate schedules to become effective June 23, 1959, which increased its prices generally, including the price of gas sold for resale for industrial use only. On June 19, 1959, the Commission ordered a hearing to be held concerning the lawfulness of such increased rates, and suspended the operation of the newly filed schedules and deferred the use of the rates fixed thereby for a period of five months beyond the time when they would otherwise have gone into effect; except that, because of the prohibitory provision of Section 4(e), it did not suspend the rates for the sale of gas for resale for industrial use only. The schedules for sales for resale for industrial use were permitted to become effective on June 23, 1959, prior to the hearing which had been ordered, and without a bond or other provision for refund of the portion thereof which might be found not justified.

The Gas Service Company, a local distributor which purchases natural gas from Cities Service, some of which it resells for industrial use only, petitioned for intervention before the Commission and for rehearing. Similar petitions were filed by others who alleged they were aggrieved by the order. Intervention was permitted but rehearing was denied. Gas Service and the others who had intervened in the proceeding before the Commission have petitioned for judicial review of the Commission's order under Section 19(b) of the Natural Gas Act.

The question before us is, therefore, whether the Commission has the power under Section 4(e) to require Cities Service to file a bond to refund any part of the increased industrial rates ultimately found to be unlawful.

The section provides that, pending a hearing and decision concerning the lawfulness of newly filed schedules, the Commission may suspend them for not longer than five months, except *it may not suspend rates for resale for industrial use only.* The statute also provides: "If the proceeding has not been concluded and an order made at the

expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect." Immediately following the sentence just quoted, the statute provides: "Where increased rates or charges are *thus*[3] made effective, the Commission may . . ." require a bond. The word "thus" is the key that locks the Commission's bonding privilege into the preceding sentence and confines its exercise to the situations there described. These two statutory sentences should, therefore, be read together. They mean, we think, only what they say: that where increased rates have been suspended and are made effective at the end of the suspension period, the Commission may require a bond.

There is no provision permitting the Commission to require a bond as a prerequisite to the effectiveness of new industrial rates. Had Congress intended to give the Commission such authority, it could easily have done so. Instead, it chose to authorize a bond only with respect to rates which had been suspended, having first expressly withheld the power of suspension with respect to industrial rates. We regard Section 4(e) as unambiguous, so we do not need to consider the legislative history which both parties urge upon us as supporting their opposing contentions. We think "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."[4]

That history shows, however, that Congress had a rational basis for making the distinction between industrial and other rates as to suspension and refund,—a distinction which we think clearly appears from the statute. We agree with the following statement in *Pacific Natural Gas Co.* v. *Federal Power Comm'n*, 276 F. (2d) 350, 354 (9th Cir. 1960):

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[3] Our emphasis.

[4] *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956).

"When the bill [which became the Natural Gas Act] was reintroduced at the next session of the Congress, the proviso exempting industrial gas from all regulation had been deleted. However, on the floor of the House an amendment was offered, which is presently found in 15 U.S.C. § 717c(c), exempting industrial gas from the Federal Power Commission's power to suspend rates, and *exempting industrial gas from the discretionary power of the Commission to require security from the supplier to make reparations in cases where new rates are set aside by the Commission as unreasonable after the period of suspension has expired.* See 81 Cong. Rec. 6727 (1937). This compromise provision apparently was acceptable to those who originally had opposed any and all regulation of industrial gas. Moreover, Representative Lea, the draftsman of both bills, noted that contracts for industrial gas were, at the time anyway, usually of short-term duration, and that the effect of the proviso was to prevent suspension when such short-term contracts were involved. See Ibid. at 6727-28. We cannot escape the conclusion that the Congress had a rational basis for saying that industrial gas needed less regulation than non-industrial gas." (Emphasis added.)

Our interpretation of Section 4(e) is buttressed by the fact that, since the beginning, the Commission's consistent construction has been that the section does not grant authority to require a bond and refunding procedure before permitting a change in industrial rates to become effective; and by the further fact that the Commission thinks it should have that power and has unsuccessfully requested Congress to confer it.[5]

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[5] See *e.g.*, Annual Reports of the Federal Power Commission for 1951-1959, at pp. 144, 152, 154, 170, 181, 18, 24, 16, 19, respectively. As these reports show, numerous unsuccessful bills have also been introduced to accomplish this purpose. For other recommendations to the same effect, see also the Commission's report to Congress on H.R. 5070, 76th Cong. (not published); Hearings before the Special Senate Committee to Investigate the Fuel Situa-

The question before us as to the meaning of Section 4(e) has not been squarely presented to the Supreme Court. But on two occasions that Court has implied or assumed the Commission cannot require a refunding bond with respect to new industrial rates while they are being investigated. These indications of the Supreme Court's view appear in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958).

In the *Mobile* case, the Court said, at page 341:

> "The powers of the Commission are defined by §§ 4(e) and 5(a) The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except 'industrial' rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. . . ."

We observe that "the further powers" added to the basic power of the Commission by Section 4(e) apply "in the case of a newly changed rate or contract (except 'in-

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tion in the Middle West, 78th Cong., 1st Sess. 748; S. Rep. No. 1234, 78th Cong., 2d Sess. 4; Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on H.R. 4051, 80th Cong., 2d Sess. 97-99.

dustrial' rates). . . ." Therefore, the Supreme Court was saying that, as to industrial rates, the Commission cannot "make its order retroactive, by means of the refund procedure, to the date the change became effective."

The Supreme Court indicated the same view in the *Memphis* case, when it said, at page 113:

> ". . .? The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission, in the case of rates for sales of gas for other than exclusively industrial use, to suspend the new rates for a five-month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed. . . ."

Petitioners argue that if Section 4(e) does not empower the Commission to require a refunding bond as a condition precedent to the effectiveness of newly filed industrial rates, it is unconstitutional because it deprives them of their property without due process of law, and unlawfully delegates to Cities Service the legislative authority to fix its own industrial rates.

Deprivation of property is visualized because it is said industrial customers *must* pay the newly filed rates without the protection of a refunding bond. The customers of Cities Service agreed, we observe, to pay the rates contained in schedules filed with the Commission for such industrial and other gas as they might buy; and they agreed that Cities Service might change its rates as it has done here. But they are not contractually bound to purchase gas under the new industrial schedules: they may use stand-by facilities, which they agreed to maintain, employing some other fuel if they find it cheaper than natural gas. Moreover, the statute does not require that a bond be exacted even in regard to the rates which are subject to refund procedure; it merely permits the exaction. So, if the bond and refund provisions applied to in-

dustrial rates, they would do no more than confer discretion on the Commission and would not give petitioners a right to the protection of a bond. Certainly the Constitution itself grants no such right. We think the unconstitutional deprivation theory is not well founded.

We cannot accept the argument that Section 4(e), as construed by the Commission, unlawfully delegates to a wholesaler such as Cities Service the legislative authority to fix its own rates. The Natural Gas Act does not delegate rate-making power to natural gas companies. The companies had that power before the passage of the Act and it was neither conferred nor enlarged by the legislation. This is seen in the *Mobile* case where the Supreme Court said, at page 343:

> "All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, *the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act:* to establish *ex parte* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. . . ." (Our emphasis.)

Constitutional arguments substantially the same as those made by the petitioners were urged upon and rejected by the Ninth Circuit in the *Pacific Natural* case. We are of the view that the opinion in that case is correct and, therefore, we regard it as dispositive of those arguments here.

The order of the Federal Power Commission will be upheld.

Affirmed.

BASTIAN, *Circuit Judge*, dissents, believing that the Natural Gas Act, Section 4(e), provides authority in the Federal Power Commission to require a bond to refund excess charges collected under the revised schedules in question, and that the legislative history, as well, so indicates.

* * * * * * * * * * *

Before: WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges*.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Power Commission on review in this case is affirmed.

Per Circuit Judge WILBUR K. MILLER.

Dated: July 21, 1960

Circuit Judge Bastian dissents.

Order Denying Rehearing En Banc

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Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

Order

Upon consideration of the petition for rehearing *en banc*, it is

ORDERED by the court that the petition for rehearing *en banc* is denied.

Per Curiam.

Dated: September 19, 1960

APPENDIX B

Article I of the Constitution of the United States, insofar as here pertinent, provides:

> Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> * * *
>
> Section 8. The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Fifth Amendment to the Constitution of the United States, insofar as here pertinent, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

> NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES
>
> SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for

resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in

any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may,

by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c].